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Jim Chen

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## The Mystery and the Mastery of the Judicial Power

*Jim Chen\**

What do law clerks do at the Supreme Court? One day this question took me entirely by surprise. Not because of its substance: I have repeatedly answered this question ever since Justice Clarence Thomas invited me to serve as his clerk for October Term 1992. As with so much else in law, context had triumphed over content. While teaching my first-year legislation class at the University of Minnesota, I asked a student to resolve the apparent tension between Justice Antonin Scalia's willingness to consult *The Federalist Papers* as the "legislative history" of the United States Constitution<sup>1</sup> and Justice Scalia's outspoken opposition to the use of ordinary legislative history in

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\* Associate Professor of Law, University of Minnesota Law School; law clerk to Justice Clarence Thomas, October Term 1992. I thank Betsy Baker, Dan Farber, Phil Frickey, Michael Stokes Paulsen, and Suzanna Sherry for their helpful suggestions. I alone am responsible for the views expressed and the mistakes made in this Article. I hope Patrick Franzese will give his other professors as much grief as he gave me.

1. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791, 2882 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part); *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992) (Scalia, J.); *Norman v. Reed*, 112 S. Ct. 698, 711 (1992) (Scalia, J., dissenting); *Harmelin v. Michigan*, 111 S. Ct. 2680, 2692 n.7 (1991) (plurality opinion by Scalia, J.); *Freytag v. Commissioner*, 111 S. Ct. 2631, 2651-54 (1991) (Scalia, J., concurring in part and concurring in the judgment); *Blatchford v. Native Village of Noatak*, 111 S. Ct. 2578, 2581 n.1, 2582 (1991); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 32-33 (1989) (Scalia, J., concurring in part and dissenting in part); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 523 (1989) (Scalia, J., concurring in the judgment); *Morrison v. Olson*, 487 U.S. 654, 697-98, 704-05, 726 (1988) (Scalia, J., dissenting); *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232, 264 (1987) (Scalia, J., concurring in part and dissenting in part); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 818, 824 (1987) (Scalia, J., concurring in the judgment); *Johnson v. Transportation Agency*, 480 U.S. 616, 671 (1987) (Scalia, J., dissenting). See generally Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

statutory interpretation.<sup>2</sup> Perhaps because Justice Scalia simply puts greater trust in James Madison, Alexander Hamilton, and John Jay than he does in the youthful legislative assistants who draft most of the committee reports on Capitol Hill? The student struck back, and furiously. What, he asked, of the reliance the entire legal profession places on Supreme Court opinions entrusted to similarly youthful law clerks? If legislative and judicial documents are merely work product<sup>3</sup> or original works of authorship<sup>4</sup> produced by the youthful, anonymous, and unaccountable agents of House members, Senators, and Supreme Court Justices, can *anyone* trust what passes for law around here?<sup>5</sup>

I leave for another time and probably another scholar the task of contemplating how much weight to give *The Federalist Papers* as constitutional legislative history. The law clerk question is the one at hand. Even this more modest question, though, masks an unseen intellectual iceberg of titanic proportions. I propose to strike twice at the ice. First, I submit that the official record of the activities of the Supreme Court's law clerks, scant though it be, lights one path through the floes. Unless one's hull (or skin) is too thin to withstand the occasional collision, the journey will yield some insights into the work of the federal courts. Nevertheless, however satisfying it may be to navigate this treacherous course, the paltry wisdom collected on this voyage might not be worth the icy dents on the starboard side. In other words, the United States Reports may provide the least accurate information about the role of law clerks at the Supreme Court. I therefore propose a second, more speculative venture. What we already know about law clerks (but have failed to notice) suggests the solution to the mystery of judicial work. Indeed, simply to acknowledge what we already know delivers nothing

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2. See, e.g., *Conroy v. Aniskoff*, 113 S. Ct. 1562, 1571-72 (1993) (Scalia, J., concurring in the judgment); *Union Bank v. Wolas*, 112 S. Ct. 527, 534 (1991) (Scalia, J., concurring); *Wisconsin Pub. Intervenor v. Mortier*, 111 S. Ct. 2476, 2487-90 (1991) (Scalia, J., concurring in the judgment); *Sullivan v. Finkelstein*, 496 U.S. 617, 631-32 (1990) (Scalia, J., concurring in all of the Court's opinion except footnote 8); *Begier v. Internal Revenue Service*, 496 U.S. 53, 67-71 (1990) (Scalia, J., concurring in the judgment); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527-30 (1989) (Scalia, J., concurring in the judgment); *Blanchard v. Bergeron*, 489 U.S. 87, 97-100 (1989) (Scalia, J., concurring in part and concurring in the judgment); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring in the judgment); *Hirshey v. FERC*, 777 F.2d 1, 7-8 & n.1 (D.C. Cir. 1985) (Scalia, J.).

3. See *Hickman v. Taylor*, 329 U.S. 495 (1947).

4. See 17 U.S.C. § 102(a) (1988) (defining the subject matter of copyright). *But see id.* § 105 (1988) (precluding copyright protection "for any work of the United States Government").

5. For one view on "the surprising juvenescence of the legal profession," see Richard A. Posner, *Goodbye to the Bluebook*, 53 U. CHI. L. REV. 1343, 1349 (1986).

short of the key to the mastery of the judicial power. And if my hunch is right, my unlawyerly observations will reveal how law clerks and their principals can be at once so awed and so reviled.<sup>6</sup>

# I. THE MYSTIQUE OF "A JUDICIARY OF JUDGES AND NOT OF CLERKS"

Among its many peculiarities, the legal profession assigns great mystical significance to the Supreme Court of the United States.<sup>7</sup> Although most American lawyers probably want to join the Court, many of the younger ones would settle temporarily for being a Supreme Court clerk. Perhaps because it is but a weak and momentary substitute, this ambition skews the public perception of Supreme Court clerks. It is not too perverse, I think, to compare Supreme Court clerks with Rhodes Scholars. There are approximately the same number of new members in each fraternity every year—thirty-six of one, roughly three dozen of the other. During October Term 1992 both credentials were represented on the Court.<sup>8</sup> To me, though, a more morbid metaphor better describes the similarity between the two experiences. Like the victory tour at Oxford, a Supreme Court clerkship is one of the few things you can accomplish before thirty that someone else might consider commemorating on your tombstone. The following description of clerk work glorifies the clerks' already too glamorous image:

Justices of the Supreme Court have long been aided in their judicial work by law clerks, a practice that finds its antecedent in 1882 when Justice [Horace] Gray hired a top graduate of the Harvard Law School to serve as a legal assistant or clerk.

Law clerks traditionally have been selected by each Justice from among recent law school graduates with superior academic records, particularly those who have had experience clerking for

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6. Cf. JAMES GEORGE FRAZER, *THE GOLDEN BOUGH* 309-19 (1922) (describing the phenomenal custom of killing divine kings as soon as their worshipers detected any personal defect).

7. From a law professor's perspective, nothing proves this point so well as the increasing (and increasingly competent) flow of ink spilled on the Court's management of its own affairs. See, e.g., H.W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* (1991); Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093 (1987); Dan T. Coenen, Book Review, 10 CONST. COMM. 180 (1993).

8. Chief Justice William Rehnquist, Justice Byron White, and Justice John Paul Stevens clerked at the Supreme Court. Justices Byron White and David Souter were Rhodes Scholars.

a lower court judge. They normally serve their respective Justices for no more than one term . . . ; many of them have gone on to distinguished legal and judicial careers.

Each Justice, including the Chief Justice, is entitled to four law clerks . . . . A recent innovation has been the pooling of law clerks from several Justices' chambers, so as to divide the heavy workload at the initial stage of screening petitions for certiorari and jurisdictional statements.

The work performed by the law clerks varies within each of the Justices' chambers, being dependent on the work patterns of the individual Justices. Virtually all of them engage in the research and analysis that underlie the opinions produced by the Justices; and they frequently read and reduce to memoranda for the Justices the endless petitions, jurisdictional statements, motions, and briefs that are circulated to the Court. They are an intimate part of the Court's judicial processes. As such, the law clerks must remain largely cloaked in "splendid anonymity."<sup>9</sup>

Fascinating though it might be, even to the point of prurient and misguided curiosity over how law clerks collectively share the guilt of their sinful employers,<sup>10</sup> the public's view of the Supreme Court clerks fails to deliver a satisfactory answer to the core question, "What do law clerks really do at the Supreme Court?" I will make no effort to consider the clerks' own view, which others have presented with varying degrees of decorum.<sup>11</sup> Rather, in order to answer first questions, I propose a return to first principles.

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9. ROBERT L. STERN ET AL., *SUPREME COURT PRACTICE* 21 (6th ed. 1986) (footnotes omitted); *see also id.* at 257-58 (describing the clerks' role in screening appeal and certiorari documents), & 573 (describing the clerks' role in identifying noteworthy briefs or passages from briefs). *See generally* DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 124-35 (1986); *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 159-61 (Kermit L. Hall ed., 1992) [hereinafter *OXFORD COMPANION*].

10. *Ignore, e.g.*, Jeff(rey) Rosen, *NEW REPUBLIC*, *passim* (especially Jeffrey Rosen, *Never Mind: Reassessing Justice Thomas*, *NEW REPUBLIC*, Sept. 21, 1992, at 19; and Jeffrey Rosen, *Poetic Justice: The Education of David Souter*, *NEW REPUBLIC*, March 8, 1993, at 25); Jeffrey Toobin, *The Burden of Clarence Thomas*, *THE NEW YORKER*, Sept. 27, 1993, at 38.

11. For the views of two former clerks who themselves attained fame as federal judges, *see* J. HARVIE WILKINSON, *SERVING JUSTICE: A SUPREME COURT CLERK'S VIEW* (1974), and Richard A. Posner, *Tribute to Justice Brennan*, 104 *HARV. L. REV.* 13 (1990). The ultimate insider's success story may well be WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* (1987). The classic unauthorized version, of course, is BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHREN: INSIDE THE SUPREME COURT* (1979) [hereinafter *THE BRETHREN*].

Do the clerks in fact act as the "real" writers of the Court's opinions? The short (and correct) answer is that while the "Justices have often praised their clerks, [they] have also been quick to point out that they themselves, not the clerks, decide cases."<sup>12</sup> If that answer lacks persuasive force, as a clumsily mumbled version of it did in my legislation class, I suggest a different approach. Why not ask the Court itself? We might find some value in the Justices' own public views of law clerks and of clerking as an institution within the judiciary. Of course, a few Justices have written or spoken about clerks and their part in the Court's daily work.<sup>13</sup> With all the respect due to the judicial infallibility that arises from the Court's finality,<sup>14</sup> these Justices' pronouncements are hardly *ex cathedra*, the stuff of legal hero-worship. Instead, I propose to review the materials all law students, most lawyers, and some law professors consult when confronted with a legal problem. Yes: statutes, rules, judicial decisions. The cellular building blocks of organic, positive law. I seek the relics of what the Court has done in fact, and nothing more pretentious.<sup>15</sup>

Every quest needs an object, and mine is no different. For my Holy Grail I name no less than the mythical beast called "[t]he judicial Power of the United States."<sup>16</sup> The verbal sinews of that beast—as I perceive it—begin as a perversion of Justice Scalia's "proud boast . . . that we have 'a government of laws and not of men.'"<sup>17</sup> However popular that sentiment might be on the Supreme Court,<sup>18</sup> one may fairly surmise that all the Justices regard

12. OXFORD COMPANION, *supra* note 9, at 160.

13. Such discussions frequently focus on the clerks' role in screening petitions for certiorari and jurisdictional statements. See, e.g., William J. Brennan, *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473, 476-77 (1973); John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 13-14 (1983); Byron R. White, *The Work of the Supreme Court: A Nuts and Bolts Description*, 54 N.Y. ST. B.J. 346, 349 (1982); Lewis F. Powell Jr., Speech Before the Fifth Circuit Judicial Conference, El Paso, Tex., at 11 (April 11, 1973), cited in STERN ET AL., *supra* note 9, at 258 n.14.

14. See *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result).

15. Cf. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897). I have chosen to exclude all mentions of "law clerks" in attorney's fee cases (where the notion of clerk is that of a practitioner's assistant rather than a jurist's) and most references to judicial law clerks as bit players in lower court proceedings.

16. U.S. CONST. art. III, § 1.

17. *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) (quoting MASS. CONST., pt. 1, art. XXX (1780)).

18. Despite Justice Scalia's claim that all "our democracy" shares his view, seven other Justices agreed in *Morrison* that the Constitution could tolerate a special prosecutor independent of the executive branch. *Morrison*, 487 U.S. at 693-97.

themselves the leading officers of "a judiciary of judges and not of clerks." It is, after all, exceedingly difficult to defend Justice Scalia's boast in its unadulterated form. To the extent that governmental *personnel* determine what the laws are and principal-agent relationships of varying degrees of formality define how governmental personnel perform their duties, we do have a government of men, women, and sometimes even politicians. I state nothing beyond the wisdom collected in the hoary common law of agency. Just as imputing the acts of agents to their principals is as essential a legal fiction as the assumption that all citizens know the laws, the idea of law in the modern bureaucratic state cannot survive without some tolerance for delegation and ghost-writing. Like all others, presumptions about delegation and agency have their pitfalls. After all, a stunning amount of Anglo-American law rests on the outrageous notion that courts may render no judgments against the sovereign. How, indeed, could judges impose damages on a sovereign that breathed divinely ordained life into the otherwise inert courts?<sup>19</sup>

But really, the core idea isn't complicated at all. Let me express this notion in terms that can be understood all along Pennsylvania Avenue and beyond: We presume that the legislative aide, the White House staffer, and, yes, the law clerk don't just work for the Senator, the President, the Justice. They become, they *are* the Senator, the President, the Justice.

I suspect that Justice Scalia himself would disavow the most extreme implications of decoupling the substance of the law from the individuals who make, enforce, and interpret the law. The idea of a unitary executive, so crucial to Justice Scalia's unified field theory of law,<sup>20</sup> never enjoyed greater support in tangible, positive law than in *Myers v. United States*.<sup>21</sup> *Myers*, of course, held that the President's article II appointment power<sup>22</sup> necessarily implies the right to fire executive branch appointees at will. Actually, *Myers* may fairly be cited for any proposition deducible from the single premise that the President needs broad powers of personnel management to accomplish everything commanded or permitted by Article II of the Constitution.<sup>23</sup>

Yet this is an Article about judicial clerks, not about separation of powers. Behold! a false and misleading distinction. *Myers* itself suggests how we might link the two topics. Its author, William Howard Taft, not only served as President. He was Chief Justice of the United States when law

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19. *But cf. Genesis 3 passim.*

20. *See Morrison*, 487 U.S. at 705, 727-32 (Scalia, J., dissenting); *see also United States v. Fausto*, 484 U.S. 439, 449 (1988) (Scalia, J.).

21. 272 U.S. 52 (1926).

22. *See* U.S. CONST. art. II, § 2, cl. 2.

23. *See, e.g., Bowsher v. Synar*, 478 U.S. 714, 726 (1986) (holding that "Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment").

clerks became a formal and then a permanent part of the Supreme Court staff. And if the personal union of the highest executive and judicial offices of the land in Taft does not self-evidently establish *Myers*'s relevance to this Article, consider how Justice Scalia connects the theory of the unitary executive to the functioning of judicial clerks. In his impassioned dissent in *Mistretta v. United States*,<sup>24</sup> the case upholding the composition of the Federal Sentencing Commission, Justice Scalia stated the following proposition: "[U]nlike executive power, judicial and legislative powers have never been thought delegable. A judge may not leave the decision to his *law clerk*. . . . Senators and Members of the House may not send delegates to consider and vote upon bills in their place."<sup>25</sup> Although Justice Scalia has never delineated the exact rationale underlying this set of assumptions, (as Chief Justice Taft failed to do in *Myers*) he seems to draw force from the Constitution's treatment of appointment of personnel as an essentially executive function.<sup>26</sup>

Regardless of its origins, Justice Scalia's view of law clerks can be expressed through the syllogistic logic he has perfected. That view consists of a single postulate and a few as yet undiscovered theorems. The postulate: official actors must *themselves* perform official acts. Theorem the first: assistants to official actors may not, and therefore *cannot*, expand or contract the scope of official authority. And critical to my discussion here, theorem the second: any *ultra vires* act by an assistant is void *ab initio* and may not be attributed to the officer. One might restate Justice Scalia's personnel theory in the following fashion: "Every assistant must be conclusively presumed to be authorized. The idea of an assistant without intelligible authority is foreign to the idea of rule of law and inadmissible." This formulation so closely resembles the credo Henry Hart and Albert Sacks promoted<sup>27</sup> that I call it Scalian Legal Process.

Justice Scalia has deployed his Legal Process theory in a jihad against nontextual approaches to statutory interpretation. Specifically, he has used the personnel theory to condemn interpretive reliance on legislative history. On at least two occasions he has reinforced his criticism of this practice with mocking references to one of Washington's dirty secrets: Members of Congress do very little of the Hill's work. The following passage is instructive:

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24. 488 U.S. 361 (1989).

25. *Id.* at 425 (Scalia, J., dissenting) (emphasis added).

26. *But cf.* U.S. CONST. art. II, § 2, cl. 2 ("[B]ut the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments").

27. See HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge Jr. and Philip P. Frickey eds., 1994) (forthcoming).



That the Court should refer to the citation of three District Court cases in a document issued by a single committee of a single house as the action of Congress displays the level of unreality that our unrestrained use of legislative history has attained. I am confident that only a small proportion of the Members of Congress read either one of the Committee Reports in question . . . . As anyone familiar with the modern-day drafting of congressional committee reports is well aware, the references to the cases were inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform the Members of Congress what the bill meant . . . , but rather to influence judicial construction. What a heady feeling it must be for a young staffer, to know that his or her citation of obscure district court cases can transform them into the law of the land, thereafter dutifully to be observed by the Supreme Court itself.<sup>28</sup>

This raises a more serious problem than Justice Scalia may have anticipated. If excessive internal delegation undermines the reliability of legislative materials (or at least legislative materials that did not obtain majority support in both houses and undergo presentment to the President),<sup>29</sup> it takes a monumental leap of faith to trust *anything* produced in Washington.

Does anything about law clerks' legal status as inferior judicial officers qualitatively distinguish them from the other unfettered youths who grease Washington's governmental cogs when they're not cruising Connecticut Avenue? Congress has "by Law vest[ed] the Appointment of [these] inferior Officers . . . in the Courts of Law."<sup>30</sup> Title 28 of the United States Code, section 675 authorizes "[t]he Chief Justice of the United States, and the associate justices of the Supreme Court [to] appoint law clerks . . . whose salaries shall be fixed by the Court."<sup>31</sup> Forty years after Justice Gray began paying law clerks out of his own pocket,<sup>32</sup> Congress in 1922 appropriated

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28. *Blanchard v. Bergeron*, 489 U.S. 87, 98-99 (1989) (Scalia, J., concurring in part and concurring in the judgment); see also *United States v. R.L.C.*, 112 S. Ct. 1329, 1340 (1992) (Scalia, J., concurring in part and concurring in the judgment) (questioning whether members of Congress "have genuinely considered what their staff has produced").

29. See *INS v. Chadha*, 462 U.S. 919 (1983).

30. U.S. CONST. art. II, § 2, cl. 2.

31. 28 U.S.C. § 675 (1988).

32. See OXFORD COMPANION, *supra* note 9, at 159-60.

\$3,600 for each law clerk.<sup>33</sup> Two years later law clerks became a permanent statutory fixture,<sup>34</sup> and they have since endured.

To the casual observer, the Court may appear indifferent or perhaps even hostile toward its law clerks. Supreme Court rules restrain law clerks from the practice of law during and (to a lesser extent) after their service at the Court.<sup>35</sup> The Court has also adopted a clerks' code of conduct, which consists of six ethical canons.<sup>36</sup> And, yes, the Court has also mentioned law clerks in its adjudicative capacity as well as in its rulemaking capacity. But one stark fact stands out. Virtually every mention of a Supreme Court clerk has taken place in a dissenting opinion or in the variety of dissent that has characterized the work of Justice Scalia and his sometime archrival, Justice Stevens: an opinion concurring in the judgment of the Court. Is there something intrinsic to law clerks or clerkdom that almost invariably consigns clerks to complicity in losing causes?

Perhaps a dissenting opinion by Chief Justice Warren Burger can shed some light. Although Chief Justice Burger was not writing specifically about his own legal advisers or those of his fellow Justices, he failed to distinguish Supreme Court clerks when he described a law clerk as the sort of "quasi-insider" whose "informational advantage is obtained by conversion and not by legitimate economic activity that society seeks to encourage."<sup>37</sup> Law clerks, again of the generic variety, hardly fared better when Justice Thurgood Marshall in dissent quoted a state trial judge's criticism of an inept motion of dismissal: "I don't know who drafted it, but I can tell you if a law clerk of mine out of law school drafted something like that, I would send him back for a refresher course."<sup>38</sup>

Law clerks' credibility as competent legal thinkers may have sunk to its perigee in *Wingo v. Wedding*,<sup>39</sup> a case involving the role of federal magistrates in the criminal justice system. Both the majority and the dissent

33. Act of June 1, 1922, ch. 204, tit. II, 42 Stat. 614.

34. See Act of May 28, 1924, ch. 204, tit. II, 43 Stat. 218.

35. "No one serving as a law clerk . . . to a Justice of this Court . . . shall practice as an attorney or counselor . . . while holding that position; nor shall such person after separating from that position participate, by way of any form of professional consultation or assistance, in any case before this Court until two years have elapsed after such separation; nor shall such person ever participate, by way of any form of professional consultation or assistance, in any case that was pending in this Court during the tenure of such position." SUP. CT. R. 7.

36. See CODE OF CONDUCT FOR LAW CLERKS OF THE SUPREME COURT OF THE UNITED STATES (Mar. 3, 1989).

37. *Chiarella v. United States*, 445 U.S. 222, 242 n.3 (1980) (Burger, C.J., dissenting).

38. *Lee v. United States*, 432 U.S. 23, 38 (1977) (Marshall, J., dissenting).

39. 418 U.S. 461 (1974).

denigrated law clerks. Writing for the Court, Justice William Brennan quoted a Senate report that touted magistrates as "qualified, experienced" individuals who could "acquire an expertise in examining . . . (post-conviction review) applications and summarizing their important contents for the district judge. . . ."<sup>40</sup> By contrast, according to the report, "judges have noted that the normal 1-year clerkship does not afford law clerks the time or experience necessary to attain real efficiency in handling such applications."<sup>41</sup> Chief Justice Burger hardly rushed to clerks' aid in his dissent. He even took pains to cite material suggesting that "magistrates 'should not be simply high-paid law clerks.'"<sup>42</sup>

To be sure, the Justices have been far kinder when describing their own law clerks. For all the mystique of the Supreme Court clerkship as a professional credential, only once has any Justice referred to former clerkship status as evidence supporting an attorney's credibility. Justice William Douglas mentioned in passing that Sidney Davis, contributor to a study of criminal law that Justice Douglas was citing with approval, had once clerked for Justice Hugo Black.<sup>43</sup> One could expect no less from the lone Justice ever to have married a former clerk.<sup>44</sup>

In any event, the Supreme Court clerkship's credential value should turn on what clerks do *after* they leave the Court's employ.<sup>45</sup> If a clerk seeks immediate recognition within the pages of United States Reports, the scant empirical evidence on point suggests that the best strategy is to do the job and to do it well. Justice John Marshall Harlan was the first member of the Court to acknowledge a clerk's contribution in the text of an opinion. At the end of a footnote in an in-chambers opinion granting a bail application, he stated that "[t]he foregoing data c[ame] either from the record in the present case or from the research of my Law Clerk."<sup>46</sup>

In an even more appreciative reference, Justice Stevens relied directly on the quantitative expertise of one of his law clerks. Dissenting from the Court's decision in an employment discrimination case, he wrote the following:

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40. *Id.* at 473 n.18 (quoting S. REP. NO. 371, 90th Cong., 1st Sess. 26 (1967)).

41. *Id.*

42. *Id.* at 476 n.2 (Burger, C.J., dissenting) (quoting Reports of the Conference for District Court Judges, 59 F.R.D. 203, 221 (1973)).

43. See *Heutsche v. United States*, 414 U.S. 898, 903 n.5 (1973) (Douglas, J., dissenting).

44. THE BRETHREN, *supra* note 11, at 18.

45. See *supra* notes 8, 11 (identifying former clerks who have gone on to high judicial office); cf. *supra* note \* (identifying one former clerk who has attained nonpareil professional satisfaction, albeit in a less conspicuous position).

46. *Noto v. United States*, 76 S. Ct. 255, 258 n.4 (1955) (Harlan, J., in chambers).

After I had drafted this opinion, one of my law clerks advised me that, given the size of the two-year sample, there is only about a 5% likelihood that a disparity this large would be produced by a random selection from the labor pool. If his calculation (which was made using the method described in H. Blalock, *Social Statistics* 151-173 (1972)) is correct, it is easy to understand why Hazelwood offered no expert testimony.<sup>47</sup>

This passage is remarkable for two reasons. First, Justice Stevens all but cited his law clerk as authority for a crucial point, the scientific validity of a statistical analysis. Second, I believe that this is the only instance in which a Supreme Court Justice has openly addressed the common question of whether the Justice or the clerk drafts opinions. Those who ascribe too much significance to clerks' contributions should take heed.

Until October Term 1992, therefore, the record of the Court's official references to law clerks consisted of curious episodes of little value to anyone besides a contestant in the Court's year-end trivia contest.<sup>48</sup> These references scarcely supplied the theoretical foundation for any grand jurisprudential theory, much less something as ambitious as Scalian Legal Process. During my Term at the Court, however, the Court made an astonishing reference to one of the Justices' law clerks during a spectacular clash over the propriety of using legislative history in statutory interpretation. In *Conroy v. Aniskoff*,<sup>49</sup> Justice Stevens described the relevant provision of the Soldiers' and Sailors' Civil Relief Act of 1940<sup>50</sup> as "unambiguous, unequivocal, and unlimited" in its "statutory command . . . that [a] period of military service 'shall not be included' in the computation of 'any period now or hereafter provided by any law for the redemption of real property.'"<sup>51</sup> In rejecting the proposition that "a member of the Armed Services must show that his military service prejudiced his ability to redeem title to property before he can qualify for the statutory suspension of time,"<sup>52</sup> Justice Stevens refused to "depart[] from the unambiguous statutory text."<sup>53</sup> He nevertheless consulted legislative history, which confirmed the Court's conclusion.

In an opinion concurring in the judgment, Justice Scalia accumulated

47. *Hazelwood School Dist. v. United States*, 433 U.S. 299, 318 n.5 (1977) (Stevens, J., dissenting).

48. *Contemplate*, e.g., one white Supreme Court mug given by Chief Justice Rehnquist to the author as a member of the Pursuit of Happiness team, trivia contest winners in October Term 1992.

49. 113 S. Ct. 1562 (1993).

50. 50 U.S.C. App. § 525 (1988).

51. *Conroy*, 113 S. Ct. at 1564.

52. *Id.*

53. *Id.* at 1564.

legislative history that, according to him, undermined the apparent clarity of the statutory text. Justice Scalia "confess[ed] that [he] ha[d] not personally investigated the entire legislative history—or even that portion" he had detailed.<sup>54</sup> Instead, he said, "the excerpts [he] ha[d] examined and quoted were unearthed by a hapless law clerk to whom [he] assigned the task."<sup>55</sup> And because "[t]he other Justices have, in the aggregate, many more law clerks . . . it is quite possible that they would discover . . . many faces friendly to the Court's holding" to offset the unfriendly ones Justice Scalia had introduced.<sup>56</sup>

By recognizing his law clerk's participation in the attack on *Conroy's* use of legislative history, Justice Scalia marked several milestones. At the most technical level, Justice Scalia's reference to his "hapless law clerk" effectively put one of us splendidly anonymous legal advisers into a majority opinion for the first time in the Court's history. For Justice Stevens responded in kind by acknowledging that Justice Scalia's "'hapless law clerk' ha[d] found a good deal of evidence in the legislative history that many provisions of this statute were intended to confer discretion on trial judges."<sup>57</sup>

More significantly, Justice Scalia's *Conroy* concurrence is the first instance in which a Justice has admitted such complete reliance on a law clerk. That Justice Scalia would be the first Justice to launch so public and prominent a confession is nothing short of extraordinary. Recall that Justice Scalia has explicitly disavowed the possibility of delegating the federal judicial power. Presumably he means not only officers outside the judicial branch but also any subordinate personnel within the judiciary, including law clerks.<sup>58</sup> Unless one wishes to accuse Justice Scalia of deviating from his formal vision of law clerks as incapable of exercising delegated judicial authority—and I do not particularly care to do so—one must try to reconcile his "hapless law clerk" reference with the rest of Scalian Legal Process.

In this instance, logic commands precisely one conclusion. Justice Scalia unmistakably sent his clerk on what the Justice genuinely believed to be an unlawful mission. Reading Justice Scalia's *Conroy* passage *in pari materia* with his "staffer" attack on legislative history permits no other inference. Whatever authority the law clerk exercised, Justice Scalia surely did not

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54. *Id.* at 1571 (Scalia, J., concurring in the judgment).

55. *Id.*

56. *Id.* at 1571-72.

57. *Conroy*, 113 S. Ct. at 1567 n.12.

58. For a helpful, not hapless, discussion of the fiction by which the law transforms a governmental officer into an embodiment of the government itself, see John F. Duffy, Comment, *Sovereign Immunity, the Officer Suit Fictions, and Entitlement Benefits*, 56 U. CHI. L. REV. 295 (1989).

believe it to be judicial.<sup>59</sup> Since he made no effort at meaningful supervision of the law clerk's research, he could not fulfill his judicial oath to uphold the Constitution. But the pragmatists among us can forgive a solitary deviation such as this. The Court's unceasing hostilities over proper interpretive technique have now embroiled Justice Scalia's "hapless law clerk" and the star-crossed mission on which that clerk was dispatched. At the very least, Justice Scalia's image of trench warfare between law clerks as Justices' proxies suggests his revulsion at the putatively ugly and politicized nature of using legislative history. Perhaps he is hoping that the very thought of law clerks commissioned to seek and destroy disfavored portions of any statute's legislative record would be enough to retard other Justices' penchant for using extrinsic evidence of statutory meaning.

One thing lies beyond dispute: Justice Scalia has remained quite faithful to a singular vision of the judicial power—his own. He firmly believes that the judicial power cannot be delegated. He nevertheless delegated to his clerk the task of researching legislative history. Research into legislative history must therefore fall outside the scope of the judicial power of the United States.<sup>60</sup> Such intellectual purity deserves admiration. Chaste Galahad and pious Percival were destined to behold the Holy Grail of Arthurian legend, while lecherous Lancelot reaped bile and bitter blindness for all his trouble.

## II. GRAIL SEEKERS, GATEKEEPERS, AND LAW DEALERS

As it happens, I have a little eye trouble right now. I frankly don't share the clarity of Justice Scalia's vision. But I can make out the contours of a few undisputed truths about the judicial power. Clerks do not "decide cases"; they cast no votes. Clerks do not "write opinions." And clerks may not lawfully perform any action that falls outside a proper definition of the judicial power. That much is clear from Justice Scalia's opinion in *Conroy*. I nevertheless remain dissatisfied. The record of the Supreme Court's references to its own law clerks discloses little of substance besides one Justice's belief that research into legislative history falls outside the judicial power. A single example of

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59. Cf. *Forrester v. White*, 484 U.S. 219, 227 (1988) (distinguishing between "judicial acts and the administrative, legislative, or executive functions that judges may on occasion be assigned by law to perform").

60. For what it may be worth, the American public should now be able to expect Justice Scalia to perform (or at least to supervise directly) all of his research into *The Federalist Papers* and other evidence of the original intent of the Constitution's framers. Justice Scalia plainly treats that activity as a proper incident of the judicial power to decide cases and controversies arising under the Constitution, *see* cases cited *supra* note 1, and fidelity to his judicial nondelegation doctrine would require him to conduct or supervise the research personally.

what the judicial power *is not* provides a meager basis for tackling the entire, existential question of what the judicial power *is*.<sup>61</sup>

I now see that my use of legal reasoning without due consideration of putatively "nonlegal" learning has kept me from completing my original quest. After all, a former Supreme Court Justice predicted nearly a century ago that "the man of the future [would be] the man of statistics and the master of economics,"<sup>62</sup> and a former Supreme Court clerk recently proclaimed that prophecy fulfilled.<sup>63</sup> The legal enterprise remains the art of predicting how courts (and other interpreters of law) will behave, but modern learning has given us new divining tools. I am not particularly fond of the consequences that follow the choice to bury a talent rather than to use it.<sup>64</sup> Perhaps, then, I can regain my vision<sup>65</sup> and complete a second crusade, but only if I wield different weapons. Cloaked in more realistic armor, I stalk anew an *Unholy* Grail. "In times like these when everyone is wonderful, what is needed is a quest for evil."<sup>66</sup> I no longer yearn to unlock the mystery of the judicial power. I lust instead to comprehend the mastery of the judicial power.

One trap has ensnared Justice Scalia, my inquisitive legislation student, and traditional legal scholars alike. The predominant American legal culture—what Robin West has called "liberal legalism"<sup>67</sup>—has naively perpetuated the Blackstonian fallacy that courts settle disputes, decide cases, and write opinions according to objective legal reasoning.<sup>68</sup> Too harsh an indictment? Consider this: Whether the sniper fire comes from the right or from the left, critics of the Court have condemned the Justices' collective failure to adhere to coherent, determinate legal principles.<sup>69</sup> The blemish in

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61. *But cf.* *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2145 (1992) (Scalia, J.). Even though the Constitution's exhortation that the President "take Care that the Laws be faithfully executed," U.S. CONST. art. II, § 3, does not appear to limit the range of "Laws" Congress may enact, Justice Scalia in *Lujan* wrote that the existence of this obligation, "the Chief Executive's most important constitutional duty," prohibits Congress from "convert[ing] the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts." 112 S. Ct. at 2145.

62. *See* Holmes, *supra* note 15, at 469.

63. *See* Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761 (1987).

64. *See* *Matthew* 25:14-30.

65. *Cf.* John Milton, *When I Consider How My Light Is Spent* (1673).

66. WALKER PERCY, *LANCELOT* 144 (Avon 1977).

67. Robin West, *The Supreme Court, 1989 Term—Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43, 46 (1990).

68. *See generally* 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* \*\* 63-92 (1765).

69. *Compare, e.g.* ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL*

the contemporary concept of law has never faded: our legal culture's "public rhetoric," regardless of the prevailing "official theory," still patrols an imaginary border "between politics, where people simply [fight] over what they want[], and law, where people [are] regulated by principles transcending personal interests."<sup>70</sup> Along a relatively quiet stretch of that imaginary border, Justice Scalia's judicial nondelegation doctrine binds judges and clerks alike to a solemn oath never to mix law and politics, never to ply the profane tools of the legislative arena in the judiciary's pristine legal parlor.

I deem this continued insistence on dividing law from politics to be a public menace. Conventional legal theory cherishes and perpetuates the myth of an unelected, apolitical, and benign federal judiciary. True, the Constitution provides that federal judges "shall hold their Offices during good Behaviour" and that their "Compensation . . . shall not be diminished during their Continuance in Office."<sup>71</sup> But I find implausible the sequence of inferences leading to the conclusions (1) that judicial review is (or at least should be) apolitical, and (2) that apolitical judicial review exists primarily, perhaps exclusively, to prevent unrestrained democracy from crushing "discrete and insular minorities."<sup>72</sup> Rather, the absence of direct electoral control over the federal judiciary merely permits a different bundle of self-regarding interests to influence judicial decisionmaking.

The only shocking thing is that the priests of prevailing legal orthodoxy persist in denying the political accountability of the courts. The electorate exercises a potent form of *indirect* control over the judiciary. How many votes in the 1992 presidential election turned at least in part on the Reagan and Bush administrations' record of Supreme Court appointments? How many votes in Senate races in which past confirmation battles became campaign fodder? I'll forgo the obligatory NEXIS search; if I had wanted to conduct empirical research, to work in a field in which facts actually mattered, I would have chosen some profession besides law. The inescapable political truth is this: Each of the 102 directly elected participants in any battle over a federal

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SEDUCTION OF THE LAW 69-100 (1990) (condemning the Warren Court for sacrificing morally cogent principles of law to the expedient whims of progressive politics) *with*, e.g., MARK TUSHNET, RED, WHITE AND BLUE 108-46 (1988) (condemning the rights-based jurisprudence of Ronald Dworkin for its failure to generate determinate results). See generally H. JEFFERSON POWELL, THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM 234-54 (1993) (describing how "a leading Socialist CLS professor and a conservative Republican have so much in common at the most fundamental intellectual level").

70. Mark Tushnet, *Idols of the Right*, 1993 DISSENT 475, 476.

71. U.S. CONST. art. III, § 1.

72. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938); see also e.g., JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980); JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).



judicial appointment must anticipate the eventual need to seek reelection or to anoint a successor from the same party. Thanks to the combination of presidential nomination and senatorial advice and consent, an electorate not able to vote directly for Supreme Court Justices will instead channel its political energies through the White House and the north wing of the Capitol.

The supposedly "unelected" nature of Supreme Court seats may actually make judicial decisionmaking even more "political" than its legislative and executive equivalents, insofar as we define "politics" as the substitution of impassioned, evanescent will for neutral, immanent reason.<sup>73</sup> With Congress, at least, popular displeasure with official action can be translated into votes at some form of public referendum, however flawed, on a regular two-year schedule. Under the fatalistic view that legal solutions emerge freakishly and unpredictably out of the political system's usual chaos,<sup>74</sup> the relatively stagnant nature of the Supreme Court's composition ensures that judicial disorder will most often go unchecked. It takes scandals to unseat Justices, wars to amend the Constitution. Politically outmoded Justices linger. Their clerks continue to wage wars already lost, scarcely aware that their foes have conquered every other aspect of politics and culture in the nation's capital. So it was with an earlier generation of predominantly progressive legal academics whose clerkships during the transition between the Warren and Burger Courts failed to inform them of the ensuing quarter century of Republican hegemony. So it may be with my generation of young Republicans who probably do not appreciate the full significance of Bill Clinton's victory in November 1992.

Just what self-regarding interests drive the judicial process in the absence of readily perceptible constituents who can anticipate the next election? It is not entirely inappropriate to speak of "Law" as the insatiable vote-seeker who vies for judicial attention. In ascribing anthropomorphic characteristics to the law, I need not impute to the Justices or their clerks the sort of base partisan motives that supposedly animate all members of Congress. Federal judicial officers neither seek nor receive campaign contributions, least of all from "the Law." But they do serve their own visions of the judicially discernible and administrable Good, as a love-struck gentleman from La Mancha might honor any request by his patron. Whether those visions of the Good revolve around intrinsic legitimacy, procedural regularity, or distributive justice is no concern of mine. What matters is that some ethereal personage called Lady

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73. This separation between objective "law" and subjective "politics" is perhaps best summarized by the title of Herbert Wechsler's celebrated article, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

74. See JOHN KINGDON, *AGENDA, ALTERNATIVES, AND PUBLIC POLICIES* (1984); Michael D. Cohen et al., *A Garbage Can Model of Organizational Choice*, 17 ADMIN. L.Q. 1 (1972).

Law—may I personify her as Lady Justice's unapologetically sighted twin sister?—induces judges to decide cases under the banner "Rule of Law."<sup>75</sup> In this regard I have no quarrel with liberal legalism. Judges, especially the nine very talented ones called Justices of the Supreme Court, do sincerely seek to uphold their oaths of office by announcing and enforcing legal principles. The trouble starts when legal principles, like all other sorts of preferences, fail to follow any rational, predictable order.

Despite all the earnestness with which Supreme Court Justices and their clerks perform their duties, one fatal flaw dooms the Court's decisionmaking process to permanent incoherence and indeterminacy. The Court, like any legislature, makes decisions *collectively*. Kenneth Arrow's impossibility theorem,<sup>76</sup> so frequently and successfully launched to expose the folly in attributing consistency and rationality to legislative voting,<sup>77</sup> has strangely left the judiciary almost unscathed. The academy almost seems addicted to a fantasy of an almighty, perfectly rational Court that operates in some kind of nonexistent legal nirvana.<sup>78</sup> "Almost," I say, because Judge Frank Easterbrook authoritatively demonstrated a dozen years ago that Supreme Court opinions do succumb to the same instability, arbitrariness, and duplicity that cripples legislative decisions.<sup>79</sup> Appellate court decisions, after all, are the products of groups rather than individual actors.<sup>80</sup> Judge Easterbrook convincingly proved that unless this society is prepared to let Justices "delegate their authority," to "allow one Justice always to decide the cases [as]

75. Cf. Frank Loess, "Guys and Dolls," title song to *Guys and Dolls* ("When you see a guy reach for stars in the sky, you can bet that he's doing it for some doll.").

76. See KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963) (1951).

77. See, e.g., WILLIAM RIKER, *LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE* 167 (1982); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547-48 (1983); Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123, 126-27 (1989).

78. See Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L.J. 1219, 1229-30 (1994); cf. Bruce Chapman, *The Rational and the Reasonable: Social Choice Theory and Adjudication*, 61 U. CHI. L. REV. 41 (1994).

79. See Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 814-23 (1982).

80. See Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82, 82 (1986); Michael E. Levine & Charles R. Plott, *Agenda Influence and its Implications*, 63 VA. L. REV. 561, 563 (1977); David Post & Steven C. Salop, *Rowing Against the Tidewater: A Theory of Voting by Multijudge Panels*, 80 GEO. L.J. 743 (1992); Stearns, *supra* note 78, at 1247-52.

dictator," or to abandon other democratic trappings of appellate adjudication, the Court's collective decisions will stay inconsistent.<sup>81</sup>

For clarity's sake, I shall recite Arrow's theorem: No system of pooling individual preferences can satisfy all five of the following conditions of democratic governance:

1. Unanimity: If all people entitled to a say in the decision prefer one option to another, that option prevails.
2. Nondictatorship: No one person's views can control the outcome in every case.
3. Range: The system must allow every ranking of admissible choices, and there must be at least three admissible choices with no other institution to declare choices or rankings out of bounds at the start.
4. Independence of Irrelevant Alternatives: The choice between options *A* and *B* depends solely on the comparison of those two.
5. Transitivity: If the collective decision selects *A* over *B* and *B* over *C*, it also must select *A* over *C*. This is the requirement of logical consistency.<sup>82</sup>

Viewing the Court through the lens of public choice theory demystifies the judicial process into merely another microeconomic system in which outcomes and legal reasoning reflect nothing but "political choices . . . determined by the efforts of individuals and groups to further their own interests."<sup>83</sup> And Arrow's theory confirms that this descent into chaos—this swan dive propelled by the "material self-interest of the judges"<sup>84</sup>—is inexorable and irreversible. For this wound to Blackstone's vision of ordered adjudication, there is no cure.

According to Arrow's theorem, three distinct problems can afflict the Supreme Court. First, if there are more than two possible outcomes, and if different Justices do not rank the outcomes in the same order, legal rules

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81. Easterbrook, *supra* note 79, at 824, 831.

82. *Id.* at 823; see also DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 38-42 (1991). For a formal proof of the theorem, see DENNIS C. MUELLER, PUBLIC CHOICE 186-88 (1979); Herbert Hovenkamp, *Rationality in Law and Economics*, 60 GEO. WASH. L. REV. 293, 319-21 (1992); Stearns, *supra* note 78, at 1291-93.

83. Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 371 (1983).

84. Edward L. Rubin, Book Review, *Public Choice in Practice and Theory*, 81 CAL. L. REV. 1657, 1670 (1993) (reviewing FARBER & FRICKEY, *supra* note 82).  
<https://scholarship.law.missouri.edu/mlr/vol59/iss2/1>

formulated by the Court will "cycle" rather than reach equilibrium.<sup>85</sup> Second, under the phenomenon that Judge Easterbrook describes as "path dependence," any given rule may depend solely on the order in which the Court confronts particular issues and not (as one might prefer or even expect) on the superior appeal of a particular argument.<sup>86</sup> Finally, since converting any one Justice's legal principle into positive law requires four other votes, majority rule at the Court is subject to manipulation by Justices who do not vote strictly according to their legal convictions.<sup>87</sup> Such "strategic voting" may or may not seem dishonest, depending on the observer's vantage point.<sup>88</sup>

In short, the application of public choice theory to judicial decisionmaking suggests that the most important factors in any Supreme Court case may never explicitly appear on the pages of the United States Reports. According to the "chaos theorem," a corollary of Arrow's impossibility theorem, any imaginable rule can emerge from the Court as long as some catalyst—human or otherwise—generates the particular sequence of votes needed for the adoption of that rule.<sup>89</sup> Total incoherence in Supreme Court case law need not depend on willful or malicious human action. Faithful adherence to *stare decisis* can of its own force wreak havoc with harmony in case law.<sup>90</sup> Legal principles "depend[] on the fortuitous order" in which particular cases are decided.<sup>91</sup> I adopt Judge Easterbrook's illustration of this point. Having voted to hold that an individual right of privacy prohibits state regulation of abortions, the Court might find itself institutionally obligated in

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85. See FARBER & FRICKEY, *supra* note 82, at 39; Easterbrook, *supra* note 79, at 815.

86. Easterbrook, *supra* note 79, at 817; Post & Salop, *supra* note 80, at 762-64.

87. See Easterbrook, *supra* note 79, at 821-22.

88. Contrast, for example, legal process scholars' eagerness to encourage the writing of majority opinions even at the expense of expressing heartfelt legal positions in dissents and in opinions concurring in the judgment, *see, e.g.*, Archibald Cox, *The Supreme Court, 1979 Term—Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 72-73 (1980); Henry M. Hart, *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959), with the deadening absence of academic support for the practice of "defensive denials," by which Justices vote to deny certiorari whenever they fear that Supreme Court review will yield a bad decision on the merits, *see* PERRY, *supra* note 7, at 198-207, 275-76, 281; Coenen, *supra* note 7, at 188.

89. See FARBER & FRICKEY, *supra* note 82, at 39-40; PETER C. ORDESHOOK, *GAME THEORY AND POLITICAL THEORY: AN INTRODUCTION* 71-82 (1986). *See generally* Richard D. McKelvey, *General Conditions for Global Intransitivities in Formal Voting Models*, 47 ECONOMETRICA 1085 (1979).

90. See Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 425-26 (1988).

91. Easterbrook, *supra* note 79, at 819.

later disputes to strike down virtually all laws regulating sex between or among consenting adults. Conversely, had a case requiring a broader privacy holding arisen first, the Court might have found no individual right of privacy for sexual behavior, a decision that would later compel the upholding of the abortion statute.<sup>92</sup> If the passive presence of "[m]ajority voting plus stare decisis . . . may produce any outcome favored by any number of Justices, however small,"<sup>93</sup> imagine how affirmative manipulation of the Court's deliberative agenda can distort judicial decisionmaking. Arrow's theory thus demonstrates that "principled" legal reasoning is thrall to raw fortune and agenda control.

Outright human "manipulation" of the Court's agenda frequently takes the form of virtually invisible cooperation between the Justices and their law clerks. And it need not be anything but benign. Despite the frequently ministerial nature of the task, clerks acting as gatekeepers for their Justices and for the Court command enough discretion to twist the Court's agenda. When writing summaries of jurisdictional statements and petitions for certiorari,<sup>94</sup> law clerks have the first opportunity to endorse, revise, or reject the way in which a litigant has framed the issues in a particular case. By one count, law clerks effectively dispose of more than four-fifths of the Court's docket without collective review by the Justices.<sup>95</sup> This power magnifies the inherently dictatorial nature of certiorari process.<sup>96</sup> The clerks' role in agenda-setting continues even after the Court agrees to grant plenary review. Within each Justice's chambers, the law clerk assigned to prepare a case before oral argument has practically exclusive access to the Justice. At the precise moment the conference initially votes on a case, clerks naturally have no role. The Chief Justice (or the ranking Associate Justice in a majority excluding the Chief Justice) momentarily enjoys absolute control of the Court's agenda in the interlude between the conference vote and the case assignments.<sup>97</sup> But once an opinion assignment reaches a specific Justice, the clerk's potential influence skyrockets. Drafting a proposed majority opinion gives a Justice well-nigh dictatorial control of a case vis-à-vis the rest of the Court. The draft opinion can frame the dispositive issues in any way; under public choice's chaos theorem, this can be and often is enough to nudge the

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92. *See id.*

93. *Id.*

94. This is the (in)famous "cert. pool" about which several Justices have written. *See* sources cited *supra* note 13. *See generally* PERRY, *supra* note 7, at 41-91.

95. O'BRIEN, *supra* note 9, at 184.

96. *See* Stearns, *supra* note 78, at 1281-83 (describing the certiorari process, by which a minority of Justices can control the Court's agenda, as a departure from the Arrowian condition of nondictatorship).

97. *See* O'BRIEN, *supra* note 9, at 241.

Court into adopting a position that a majority of Justices would reject as a matter of first principles. This tendency is magnified by the Court's inability to opt out of deciding a case.<sup>98</sup>

Consider an example involving the jurisprudential conundrum of prospective judicial decisionmaking.<sup>99</sup> The close of October Term 1989 found the Supreme Court hopelessly deadlocked over two competing approaches. Four Justices endorsed an equitable rule under which certain judicial decisions would be applied prospectively.<sup>100</sup> Another four favored a rule requiring the retroactive application of all decisions to all cases on direct review.<sup>101</sup> If the equities of a particular case counseled against prospective application of a prior judicial decision, application of either of these competing rules would yield the same result. Under such circumstances, the "passive virtue" of avoiding an unnecessary decision on the merits<sup>102</sup> (especially given the problem's constitutional ramifications)<sup>103</sup> would prompt the Court to write a brief *per curiam* opinion stating that the challenged decision must be applied retroactively under either test. On the last day of October Term 1989, in a pair of tax cases from West Virginia, the Court did precisely that.<sup>104</sup>

By contrast, *Harper v. Virginia Department of Taxation*,<sup>105</sup> the Court's most recent decision on this problem, produced a five-Justice majority opinion that expressly rejected one form of prospective adjudication.<sup>106</sup> Two other Justices concurred in the judgment after applying the equitable prospectivity analysis that the majority rejected.<sup>107</sup> In other words, seven Justices in *Harper* could have agreed on retroactive application of precedent without

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98. See Stearns, *supra* note 78, at 1260-61 (noting that the Court's range of options excludes inaction).

99. See generally WILLIAM N. ESKRIDGE JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 264-70 (1988); *id.* at 53-55 (Supp. 1992).

100. See *American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 179 (1990) (opinion of O'Connor, J.) (quoting *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971)).

101. See *id.* at 212 (Stevens, J., dissenting).

102. See generally ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH—THE SUPREME COURT AT THE BAR OF POLITICS 111-98 (1962).

103. Cf., e.g., *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979); *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

104. See *Ashland Oil, Inc. v. Caryl*, 497 U.S. 916, 918 (1990); *National Mines Corp. v. Caryl*, 497 U.S. 922, 923-24 (1990).

105. 113 S. Ct. 2510 (1993).

106. See *id.* at 2517-18.

107. See *id.* at 2525-26 (Kennedy, J., joined by White, J., concurring in part and concurring in the judgment).

articulating an explicit rationale, without reaching the substance of the retroactivity issue. Despite the mild *stare decisis* interest in adhering to the West Virginia tax cases, the Court ruled on the merits of the prospectivity issue. One can reasonably infer that, from the start, *Harper's* majority coalition cast the debate as a choice between competing visions of prospective judicial decisionmaking. Had there ever been a draft opinion that framed the dispute as one between the passive virtue of dodging a contentious constitutional problem and the aggressive vice of declaring a definite rule of law, one doubts that the Court would have chosen the latter.

Once the empirical arrow of modern public choice pierces the theoretical armor of traditional jurisprudence, a paradox emerges. Opinion-writing, the quintessential act of reasoned, dispassionate adjudication,<sup>108</sup> actually introduces one of the mightiest tools for manipulating the decisional apparatus in any court based on collective deliberation and majority rule. At the Supreme Court, this unexpiated original sin infects not only the Justices but also the clerks. Because law clerks do contribute, in varying degrees, to the preparation of opinions, a drafting Justice's coattails carry his or her law clerk quite far. Whether a clerk participates in the creation of a proposed majority opinion by writing a first draft, researching discrete points, or merely advising the Justice, the clerk's discretionary choice of arguments and cases can supply all the agenda control that is needed to swing outcomes and rationales in individual cases. At no point in this picture have Justices or clerks remotely approached the ultimate affront to Blackstone's model of rational, dispassionate judicial decisionmaking: conscious, "political" dickering over the dispensable details of an opinion.<sup>109</sup> If the objective becomes the consolidation of a five-Justice coalition, legal reasoning (or its absence) is probably optional and certainly negotiable. Without even running the risk of becoming a shamelessly brazen dealer in legal "reasoning," a law clerk who simply does his or her job comes far closer to mastery of the judicial power than adherents of traditional legal dogma would care (or dare) to admit.

### III. FANTASIZING ABOUT THE SORCERER'S APPRENTICES

I shall close with an illustration based on the jurist whose drive for doctrinal completeness and coherence sparked the classroom confrontation that culminated in this Article. In grappling with the problem of prospective judicial decisionmaking, Justice Scalia has explicitly endorsed the idea that judicial decisions must always apply retroactively, a cornerstone of

108. See, e.g., Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 387-88 (1978).

109. See PERRY, *supra* note 7, at 140-97.

<https://scholarship.law.missouri.edu/mlr/vol59/iss2/1>

Blackstone's vision of the judicial power as a power "not delegated to pronounce a new law, but to maintain and expound the old one."<sup>110</sup> I am perfectly willing to assume that Justice Scalia seeks consistency in his record of service on the Supreme Court. But Justice Scalia has compiled quite a curious voting record in the sequence of cases focusing on the principle of judicial retroactivity. The Supreme Court altered the Blackstonian rule of absolute retroactivity for all judicial decisions in *Linkletter v. Walker*,<sup>111</sup> which transformed the new tool of prospective overruling into a key element of the Warren Court's project of constitutional law reform.<sup>112</sup> By 1987, in *Griffith v. Kentucky*,<sup>113</sup> the Court abandoned all limits on retroactive application of new law to criminal cases on direct appeal. Dicta in that case retained a *Linkletter*-like equitable test for prospective overruling in civil cases,<sup>114</sup> and the battle over judicial retroactivity in civil cases was afoot.

In *American Trucking Associations, Inc. v. Smith*,<sup>115</sup> Justice Scalia had the opportunity to cast the deciding vote in a case that posed a clean choice between Blackstone's rule and the Warren Court's alternative. Four Justices concluded that prospective overruling was appropriate in civil cases;<sup>116</sup> another four argued that *Griffith*'s restoration of pure judicial retroactivity covered both criminal and civil cases.<sup>117</sup> Despite announcing his belief "that prospective decisionmaking is incompatible with the judicial role,"<sup>118</sup> Justice Scalia nevertheless acquiesced in limiting the retroactive effect of the judicial decision at issue<sup>119</sup> because he thought that case wrongly decided.<sup>120</sup> After *Smith*, Justice Scalia apparently believed retroactivity to be an absolute command, so long as he thought the decision at issue to have been correctly rendered.

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110. 1 BLACKSTONE, *supra* note 68, at 69, *quoted in* Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510, 2523 (1993) (Scalia, J., concurring).

111. 381 U.S. 618, 636-37 (1965).

112. *See, e.g.,* Stovall v. Denno, 388 U.S. 293 (1967); Johnson v. New Jersey, 384 U.S. 719 (1966); Tehan v. United States *ex rel.* Shott, 382 U.S. 406 (1966).

113. 479 U.S. 314 (1987).

114. *See id.* at 322 n.8. That test originates from Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971).

115. 496 U.S. 167 (1990).

116. *Id.* at 178 (opinion of O'Connor, J., joined by Rehnquist, C.J., and White and Kennedy, JJ.).

117. *Id.* at 214 (Stevens, J., dissenting, joined by Brennan, Marshall, and Blackmun, JJ.).

118. *Smith*, 496 U.S. at 201 (Scalia, J., concurring in the judgment).

119. American Trucking Ass'ns, Inc. v. Scheiner, 483 U.S. 266 (1987).

120. *See Smith*, 496 U.S. at 202-05 (Scalia, J., concurring in the judgment).



One Term later, in *James B. Beam Distilling Co. v. Georgia*,<sup>121</sup> Justice Souter's opinion announcing the judgment of the Court cast the jurisprudential issue as a choice between the Blackstonian rule of absolute retroactivity and an approach called "selective prospectivity," by which "a court may apply a new rule in the case in which it is pronounced, then return to the old one with respect to all others arising on facts predating the pronouncement."<sup>122</sup> Justice Souter refused to "speculate as to the bounds or propriety of pure prospectivity," the technique by which a court merely announces a new rule and refuses to apply it even to the parties before the court.<sup>123</sup> Denouncing both selective and pure prospectivity, Justice Scalia objected to Justice Souter's failure to restore the Blackstonian rule in its entirety.<sup>124</sup> Justice Scalia neither mentioned his opinion in *Smith* nor noted that the precedent at issue in *Beam* rested on precisely the same sort of legal reasoning that led him to condition his support of Blackstonian retroactivity in *Smith*.<sup>125</sup> After *Beam*, Justice Scalia's position appeared to have swung back to an absolutist one in favor of a rule of invariable retroactivity.

Finally, in *Harper v. Virginia Department of Taxation*,<sup>126</sup> a majority of the Court adopted the rule Justice Souter proposed in *Beam*. The Court did not address, much less condemn, pure prospectivity. Unlike *Beam*, however, *Harper* did not explicitly reserve judgment on pure prospectivity, an omission that drew sharp criticism from Justice O'Connor in dissent.<sup>127</sup> Justice Scalia nevertheless joined the majority opinion. By writing a concurrence extolling the virtues of the Blackstonian rule,<sup>128</sup> he apparently concluded that not only the results but also the reasoning in *Beam* and *Harper* could be reconciled with a regime of absolute retroactivity.

How did Justice Scalia manage to take three seemingly irreconcilable and contradictory positions on prospective judicial decisionmaking in three consecutive cases? I have already stipulated that Justice Scalia's adherence to his own legal vision does not admit the possibility that his preferences for particular rules of law can shift over time. Nor can we blame the distorting effect of precedent; at no time in these cases did Justice Scalia ever purport to rest on *stare decisis*. There was, however, a unique alignment of Justices

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121. 111 S. Ct. 2439 (1991).

122. *Id.* at 2444 (opinion of Souter, J.).

123. *Id.* at 2448.

124. *See id.* at 2450-51 (Scalia, J., concurring in the judgment).

125. *Beam* involved *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), which, like the case involved in *Smith*, *American Trucking Ass'n, Inc. v. Scheiner*, 483 U.S. 266 (1987), rested on the notion of a "dormant" commerce clause.

126. 113 S. Ct. 2510, 2517 (1993).

127. *See id.* at 2527, 2538 (O'Connor, J., dissenting).

128. *See Harper*, 113 S. Ct. at 2520-24 (Scalia, J., concurring).

in each of the three cases. After all, Justice Souter replaced Justice Brennan between *Smith* and *Beam*, and Justice Thomas replaced Justice Marshall between *Beam* and *Harper*. If Justice Scalia was strategically voting based solely on the presence of new Justices, he might have been trying to logroll or to give effect to the intensity of his preferences relative to those of his colleagues. Either of those actions would violate the Arrobian norm that Supreme Court votes should be independent of irrelevant alternatives.<sup>129</sup>

Not to despair, though. It is possible to conclude that Justice Scalia was voting his principles all along. We simply have to reconceive the three retroactivity cases as presenting three radically different pairings of dispositive legal issues, with three corresponding sets of irrelevant considerations. Thus:

*Smith*: Prospective application of bad precedent is better than purely retroactive application of bad precedent. The general issue of whether judicial decisions should operate prospectively is an irrelevant consideration.

*Beam*: Pure retroactivity is better than leaving open the issue of pure prospectivity. The correctness of the precedent at issue is an irrelevant consideration.

*Harper*: Any form of presumptive retroactivity is better than any form of prospectivity. Whether pure prospectivity is doctrinally compatible with Blackstonian jurisprudence is an irrelevant consideration.

Once the cases are described as presenting these disputes, Justice Scalia can no longer be accused of undemocratic strategic voting or, worse yet, not knowing his own preferences—ahem, principles—well enough to adhere to them. His votes in the retroactivity cases make perfect Arrobian sense. Some legal scholars actually condone—nay, laud—Justice Scalia's apparent predilection for analyzing (and voting on) cases according to discrete legal issues rather than according to ultimate disposition.<sup>130</sup> Yet this fleeting salvation may prove to be no prize. With rare exceptions,<sup>131</sup> the Court votes first either to affirm or to reverse, then over the resolution of issues necessary to an affirmance or a reversal. If Justice Scalia is in fact deciding cases issue by issue, and according to an array of issues unique to his own imagination,

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129. See Easterbrook, *supra* note 79, at 825.

130. See Post & Salop, *supra* note 80, at 745, 770-72. But see John M. Rogers, "I Vote This Way Because I'm Wrong": *The Supreme Court Justice as Epimenides*, 79 KY. L.J. 439 (1990-91).

131. See *Arizona v. Fulminante*, 111 S. Ct. 1246 (1991); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989). For an academic debate over the practice of voting issue-by-issue, compare Post & Salop, *supra* note 80 (endorsing the practice), with Rogers, *supra* note 130 (condemning the practice).

his deviation from the Court's usual practice may help explain why he has never developed the coalition-building prowess for which William Brennan and William Rehnquist are justly famous. This aberrant behavior has profoundly affected the Court's war over prospective judicial decisionmaking. No one else on the Court framed the voting agenda in *Smith*, *Beam*, or *Harper* quite the way Justice Scalia did. As a result, Justice Scalia failed to secure the Blackstonian rule of absolute retroactivity when he had the chance in *Smith*. By the time he was prepared to confront the issue squarely in *Harper*, Justice Souter's arrival at the Court had already crippled the Blackstonian rule, perhaps beyond resuscitation.

But Justice Scalia did not act alone. His law clerks were the only individuals who could have helped him pair the decisive issues in each case as he did. I can't bring myself to accuse a sitting Justice of being too weird, too blind, or too egotistical to align his view of the relevant legal issues with that of his colleagues. Some external force must be responsible when a Justice repeatedly veers from the Court's basic dispute resolution techniques. The blame must fall on the three different law clerks who so bungled agenda management within chambers that they deceived Justice Scalia into misperceiving the voting agenda in these cases. Unlike the arguably defensible *ultra vires* act in *Conroy*, these clerk shenanigans cannot be attributed to a superior's orders. With law clerks like these, who needs to worry about delegation of the judicial power? What kind of judiciary of judges is this, anyway? What a heady feeling it must be for law clerks to know that their manipulation of obscure legal concepts can transform the law of the land, thereafter dutifully to be misunderstood by the Justices themselves.<sup>132</sup>

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132. Cf. *Blanchard v. Bergeron*, 489 U.S. 87, 99 (1989) (Scalia, J., concurring in part and concurring in the judgment).